In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 270.

KOBE, INC.,
a corporation,
and
ALTA VISTA HYDRAULIC COMPANY,
a corporation,
Petitioners,

vs.

DEMPSEY PUMP COMPANY,
a corporation,
OSCAR E. DEMPSEY,
SPECIALTY SALES & SERVICE, INC.,
a corporation,
and
M. L. WALRAVEN, JR.,
Respondents.

REPLY BRIEF OF PETITIONER.

Our purpose in filing this reply brief is to make it clear that, regardless of anything said in respondents' brief, the questions stated on page 2 of our petition are squarely presented by this case.

A. The Issue of Monopolization.

This question was stated as follows in our petition:

"Does the mere acquisition, by a single owner, of most of the important patents in a field of commerce,

with the intent to use these patents to prevent infringement, coupled with the bringing of an infringement suit against an actual infringer of some of the patents, but without any refusal to grant licenses on reasonable terms, or other patent misuse, amount to a monopolization in violation of Section 2 of the Sherman Act?

After reading the suggested rephrasing of the above question on page 25 of respondents' brief, the Court may well wonder how two sets of counsel can differ so radically as to what question the case really presents. The answer is that respondents arrive at their version by treating as done by petitioner Kobe, Inc. acts which were admittedly done, and were found by the lower courts to have been done, by the prior corporation from which Dresser, petitioner's parent corporation, purchased the hydraulic pump business. Respondents' approach is typified by the statement on page 24 of their brief that petitioner Kobe, Inc. had "plotted monopoly" since 1933—this in spite of the fact that petitioner was not organized until 1945 and Dresser, its parent corporation, had no connection with the hydraulic pump business until that year.

Both the District Court in its Findings (Finding 28, R. 140) and the Court of Appeals in its opinion (R. 1323) conceded that the hydraulic pump business was acquired by Dresser from Old Kobe in an arms-length transaction in 1945, and that petitioner Kobe, Inc. was thereupon organized by Dresser to receive the assets, including the patents, which Dresser had acquired, and to take over and continue the operation of the business. While the lower courts found that Dresser and petitioner Kobe, Inc. intended to "maintain, preserve and exercise" the monopoly that the previous owner had allegedly had (Finding 44, R. 147), *there is nothing in the Findings below, and nothing*

in the record, to indicate that Dresser or petitioner Kobe, Inc. intended to attain these objectives by any other means than preventing infringement of their patents, or that they in fact did anything except to file an ordinary infringement suit and to give notices legitimately incident thereto.

Efforts of respondents to create the impression that petitioner Kobe, Inc. committed other acts of alleged patent abuse are without substance. Any attempt to fix prices, or enforce restrictive policies in servicing and repairing pumps, occurred early in the history of the previous owner of the business, and was discontinued by such previous owner long before 1945, and no finding was, or could have been, made by the courts below that petitioner Kobe, Inc. had engaged in these practices. While respondents refer repeatedly to petitioner's "disparagement" and "inducement of customer boycott" of respondents' product, the sum total of the showing of the record as to what petitioner did with regard to respondents is, as stated with record references on pages 14 and 15 of our petition, as follows:

(a) On September 14, 1948 petitioner filed the present suit.

(b) On various occasions shortly before suit was filed, when customers asked salesmen of Kobe, Inc. whether it intended to sue Dempsey for infringement, the salesmen replied that plaintiff Kobe, Inc. believed that the Dempsey pump might infringe its patents, and that, as soon as it learned definitely that a sale had been made, it would probably test the question of infringement in court.

(c) After filing the suit, and after receiving many inquiries about the suit from customers, petitioner Kobe, Inc., on September 27, 1948, sent out to purchasing agents or other executives of certain of its customers a letter advising them in factual and restrained terms that suit had been filed.

Like the filing of the suit itself, the notices referred to in (b) and (c) above were bound to have some effect in discouraging sales of respondents' infringing pumps. This being so, the lower courts had adequate basis for finding that, like the suit itself, the notices were intended to effect these results. However, as shown by the cases cited on page 15 of our petition, factual notices of this type have universally been held to be legitimate incidents of a suit for patent infringement.

While respondents, on page 22 of their brief, set forth a highly colored version of these matters, a careful reading of those portions thereof which are supported by record references will show that they do not contradict in substance the statements made by us above.

It is therefore clear that all the petitioner Kobe, Inc. did in the instant case was, first, to acquire important patents in a field of commerce, with the intent of using these patents to prevent infringement, and, second, to bring an infringement suit against the actual infringer of some of the patents, and to give factual notices legitimately incident to the suit. As stated in our petition, it was specifically found by the District Court that neither respondents nor anyone else ever asked petitioner Kobe, Inc. for a license under any of its patents, and that petitioner never refused to grant anyone such a license (Finding 43, R. 146).

If these acts alone amount to the offense of monopolization in violation of Section 2 of the Sherman Act,* petitioner was guilty thereof. We submit, however, that the question is one which has never been decided by this Court, and which is of such importance in the field of conjoint

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* While respondents seek to create the impression that petitioner was also found guilty of a violation of Section 1, this is entirely untrue and the only finding below was that petitioner was guilty of "monopolization" in violation of Section 2. See Conclusions of Law (R. 160).

application of the patent laws and the antitrust laws that this Court should take jurisdiction and decide it in this case.

B. The Issue of Liability for Damages.

This question was stated as follows on page 2 of our petition:

> "When a patentee files an infringement suit against an actual infringer of his patents in the belief that he is entitled to the relief prayed for, does the fact that the court in such suit holds that he is guilty of monopolization, and that the suit is a step in effectuating the same, convert the suit *ab initio* into a wrong against the infringer, so as to render the patentee liable to the infringer, under Section 4 of the Clayton Act, for treble the damages sustained by the infringer as a result of the suit?"

That this second question is squarely presented by the instant case appears clearly from the following facts:

1. As shown above, the only action of petitioners which affected respondents in any way was the filing of the infringement suit and the giving of the incidental factual notices thereof.*

2. While the District Court held that the suit was filed, and the notices given, in furtherance of petitioner's alleged purpose to exclude competitors, it specifically found (Finding 55, R. 151):

> "Plaintiff Kobe, Inc. did not prosecute its infringement action in bad faith, but pressed the same be-

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* While, as pointed out by respondents, the complaint herein was amended on February 4, 1949, to include allegations of unfair competition by respondents—for which allegations we believe there was probable cause—there is no finding and no indication in the record, that this amendment caused any damage to respondents or affected them in any way.

lieving that it would recover the judgments prayed for therein, and believing that it was legally entitled to the relief prayed for. It also believed it had a legal right to circularize its letter of September 27, 1948 as an accompaniment of the infringement action."

It is established law that even an actual infringer of patents has a complete defense if he can establish that the patentee has used his patents in violation of the antitrust law. However, no court before the lower courts in this case ever held that proof of this defense converts the suit, even though filed by the patentee in the belief that he was entitled to the relief prayed for, into an "injury" within the meaning of Section 4 of the Clayton Act, so as to allow the infringer to recover from the patentee treble damages for the adverse effects flowing from the filing.

As shown on pages 17 to 21 of our petition, the holding of the lower courts herein is in square and admitted conflict with the decision of the Second Circuit Court of Appeals in *Straus v. Victor*,* and is a serious impairment of the doctrine of free access to the courts.

We submit that our petition should be granted.

Respectfully submitted,

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RUFUS S. DAY, JR.,
FORD HARRIS, JR.,
Counsel for Petitioners.

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* While respondents state that the court in *Straus v. Victor* sustained an award of "commercial damages," a glance at the opinion of the court, or at the discussion in our petition, will show that such award was made on an entirely separate issue.